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October 17, 2008

In the Matter of

Burley Street, LLC

OADR Docket No. 2005-228
DALA Docket No. DEP-06-122
File No. 326-0248
Wenham

FINAL DECISION

SUMMARY:

In a Recommended Final Decision dated January 8, 2008, the Magistrate recommended denying Burley Street LLC's application for a wetlands permit and vacating the Department's Superseding Order of Conditions. The Magistrate incorrectly applied performance standards for bordering vegetated wetlands to the proposed construction of an access road located in buffer zone. When the correct regulatory standards for buffer zone are applied, the terms of the Department's Superseding Order of Conditions are more than sufficient to protect the interests of the Act and to meet the requirements of the Wetlands Regulations. The Department's Superseding Order of Conditions should be affirmed and issued as a Final Order of Conditions.

Thomas J. Harrington, Esq. and Marguerite D. Reynolds, Esq. (Miyares and Harrington LLP),
Watertown, for the petitioner.

John L. Hamilton, Esq. Hamilton, for the intervenors.

John R. Keilty, Esq., Peabody, for the applicant.

MacDara K. Fallon, Esq., Boston, for the Department of Environmental Protection.



This appeal involves a proposal by Burley Street, LLC (the “Applicant”) to build ten two-unit townhouses, a roadway and associated infrastructure on 7.2 acres of wooded land in Wenham that borders the Town of Danvers. On August 30, 2004, the Wenham Conservation Commission issued an Order of Conditions which permitted the project, but only if access was constructed from Lester Road in Danvers. The Applicant appealed and objected to this condition on the grounds that it could only access the property from Burley Street in Wenham. On October 17, 2005, the Department issued a Superseding Order of Conditions (“SOC”) under the authority of the Wetlands Protection Act (the “Act”) and 310 CMR 10.00 et seq. (the “Wetlands Regulations”) that allowed access from Burley Street on the grounds that the Applicant had demonstrated a legal impediment to access from Lester Road. The Department also required that 150 square feet of Bordering Vegetative Wetlands (“BVW”) filling would require replication of BVW under the standards of 310 CMR 10.55(4) in what is known as Area 1 where the roadway for the project would have to cross wetlands. There is no dispute that this 150 square foot of fill was unavoidable whether access was constructed from Lester Road or from Burley Street. There is also no dispute that the terms of the SOC were sufficient to meet the legal requirements of the Act and the Wetlands Regulations for Area 1.

The part of the work in controversy is the construction of the access road from Burley Street in Area 2 of the property. The proposed 20-24 foot wide access road is to be constructed on top of an existing cart path. It is undisputed that this existing path is 24 feet wide. BVW borders several hundred feet of the existing cart path within 5 feet or less along both sides from the beginning of the path at Burley Street. Because the Department found that BVW impacts were likely because of the road’s close proximity to resource areas, the Department required the Applicant to agree to mitigation measures in order to protect the interests of the Wetlands

Protection Act. The Applicant did agree to mitigation measures, including limits of work, erosion controls and other measures. The Applicant also submitted a replication plan totaling 3,000 square feet of BVW with 150 square feet of replication proposed for Area 1 and 2,850 square feet of replication proposed for Area 2. Because the Department had estimated impacts from the Burley Street roadway construction and maintenance to be approximately 1,100 square feet, the Department accepted the Applicant's proposed mitigation measures and replication plan as being protective of the Wetlands Protection Act interests served by the BVW at the Property. The Conservation Commission appealed this SOC, and a local residents group intervened.

The matter went to hearing before a DALA Magistrate in February 2007. The Conservation Commission and intervenors argued at hearing that the Lester Road access was available and that more than 6,000 square feet of wetlands would be altered by the project if the access roadway were built from Burley Street. On these two grounds, they argued that the permit should be denied. The Applicant and the Department contended that the Applicant had met its burden to demonstrate the lack of an alternative to the Burley Street access and that the SOC imposed conditions sufficient to protect the interests of the Act for the Burley Street work.

The Magistrate issued a Recommended Final Decision dated January 9, 2008. In this decision, the Magistrate rejected the contention that over 6,000 square feet of BVW was impacted, but she found that a total of 3,025 square feet of resource area on the site would be altered. The Magistrate recommended denial of a permit to the Applicant on the basis that an additional 25 square feet of wetlands must be replicated in addition to the 3,000 square feet required by the Department because the one-to-one replication standards of the BVW regulations applied. The Magistrate appeared to let stand an earlier ruling that Lester Road was not reasonably available as an access location.

Access Alternatives Analysis

In a ruling on Motion for Partial Summary Judgment on August 8, 2006, affirmed in a supplemental September 12, 2006 ruling, the Magistrate found that the Applicant had met its burden under the Act and the Wetlands Regulations to demonstrate that the only reasonable alternative for access to the property was from Burley Street. In reaching this conclusion, the Magistrate incorrectly applied the BVW performance standard of 310 CMR 10.55(4) for alternatives analysis, although the work proposed for the Burley Street access road was entirely in buffer zone. However, even under this more stringent analysis, the Magistrate found that the Applicant had demonstrated a lack of access from Lester Road.

Although the Wetlands Regulations in place at the time did not specifically require an alternatives analysis for buffer zone, the Department conducted an investigation into whether the Applicant had a reasonable legal claim that Lester Road could not be used for access to the Applicant's property.¹ During the review of the Applicant's project, on October 27, 2004, the Department sent all parties a written request asking for additional information about alternative access locations to the property, including a request for a legal opinion from all parties about the availability of access from Lester Road.

Applicant's counsel submitted a legal opinion stating that a recorded conservation restriction held by the Town of Danvers prohibited the construction of an access road to the property from Lester Road. There is also a copy of the recorded conservation restriction in the

¹ This fundamental authority for the Department to study alternatives for buffer zone projects was codified in the language of 310 CMR 10.53(1) applicable to Buffer Zone projects which allows the Department to consider alternative locations and scopes of work to avoid alteration. This amendment was enacted in 2005, after the date of filing of the notice of intent for this project and does not directly apply to it. However, the regulation codified much existing interpretation of the Department's regulatory authority over projects in buffer zone. See, *Matter of Hoosac Wind Farm EnXco, Inc.*, DALA Docket No. DEP-05-124, Docket No. 2004-174 (June 20, 2007). Therefore, the language of 310 CMR 10.53(1) is a helpful resource for interpreting the Department's authority over the work in buffer zone in the case at hand.

record. The Town of Danvers also confirmed the existence and terms of the conservation restriction, and the Town of Danvers informed the Department that this road could not be used for primary access. Based on this information, the Department concluded that the Applicant had a reasonable *bona fide* legal claim that access from Lester Road was not possible.

The Town of Wenham contested the legality of the conservation restriction on two grounds: (1) because the Board of Selectmen of Danvers had not voted to accept the restriction and (2) because the restriction had not been approved by the Secretary of Environmental Affairs. The Magistrate found in her ruling for Partial Summary Decision that the Applicant had sufficiently refuted these arguments in order to establish a *bona fide* claim, even if disputed, that the conservation restriction was valid and was an impediment to access from Lester Road. She based her decision, in part, on a prior ruling in Matter of Point of Pines Yacht Club, Final Decision, Docket No. 91-116, 4 DEPR 198, 199 (November 29, 1997) (While the Department is “Not in the business of resolving waterways property disputes, it is quite another thing to say that the Department is precluded from considering property questions at all in its licensing decisions.”...The Department can “assur[e] itself that at least an applicant has a *bona fide*, even if disputed, claim to a right to perform the work proposed in the selected location.”). She also found that the other parties did not submit any definitive proof or argument that conclusively refuted the Applicant’s legal opinion.²

² The Magistrate examined countervailing arguments by the Town of Wenham and intervenors. First, although M.G.L. c. 40, § 8c requires approval of the Board of Selectmen in order for a municipality to accept a conservation restriction, the Magistrate held that the statute does not specify a consequence for the failure of the Board to vote. The conservation restriction was a gift to the town to effectuate the conditions of approvals of another development project. It is possible that a court would enforce the restriction despite the procedural defect. On the second legal argument by the Town of Wenham, the Magistrate concluded that the failure of the Secretary of Environmental Affairs to approve the conservation restriction does not invalidate the restriction. Under the terms of M.G.L. c. 184, § 27, the Secretary’s approval would be necessary to enforce the restriction in perpetuity, but the restriction would still be valid for a term of 30 years or until 2019. Therefore, the Magistrate concluded that the Applicant had demonstrated a *bona fide* legal claim that the conservation restriction was valid and would prevent access from Lester Road.

I agree with and accept the legal ruling of the Magistrate on this issue. The Department cannot adjudicate property rights either in its permit or adjudicatory hearing proceedings. *See, Matter of Tinnirella*, Docket No. 2003-142, Recommended Final Decision, 12 DEPR 34 (March 22, 2005), adopted by Final Decision (April 11, 2005); *See, Tindley v. Department of Environmental Quality Engineering*, 10 Mass. App. Ct. 623, 411 N.E.2d 187 (1980) (An adjudicatory hearing before the Department of Environmental Protection is not the proper forum for the resolution of property disputes). However, the Department can and must make reasonable determinations about property rights and restrictions where it is necessary to do so in permitting proceedings. I am satisfied that the Department made a reasonable and justifiable decision that access from Lester Road was not possible for the purposes of issuing a SOC under the standards of the Wetlands Regulations.

Buffer Zone Work Conditions for Burley Street Access

In the Magistrate's evaluation of the access road installation from Burley Street, she began her legal analysis by setting forth the performance standards for work in BVW, which require that no work in bordering vegetated wetland shall "destroy or otherwise impair any portion of said area." *See*, 310 CMR 10.55(4)(a). None of the proposed work to install the access road from Burley Street to the property is proposed in BVW; **all work is proposed outside BVW and in buffer zone**. Therefore, the performance standards for BVW as set forth in the Wetlands Regulations do not apply to the work proposed in this project. One-to-one replication of impacts to BVW is not required for this project. The Magistrate erred in applying these performance standards.

As noted recently by the Final Decision in Matter of Hoosac Wind Project EnXco, Inc., DALA Docket No. DEP-05-124, Docket No. 2004-174 (June 20, 2007):

The distinction between proposed work in or on a resource area and work in the buffer zone has important regulatory consequences because it determines whether the performance standards apply [for the resource area in question].

Work in buffer zone does not invoke the performance standards applicable to adjacent resource areas as a matter of law. Work in buffer zone requires review only to ensure the protection of the interests of the Act. See, 310 CMR 10.03(1)(a)(3); Matter of Hoosac Wind Project EnXco, Inc.; Matter of Worcester School Department, Docket No. 99-164, File No. 349-624 (Commissioner's Remand Decision, June 15, 2001); Matter of Edwin C. Cohen, Docket No. 99-206, File No. 12-353 (Final Decision, May 3, 2001); Matter of Bachand, Docket No. 99-127 & 99-031, File No. SE4-128 (Final Decision, February 2, 2001). Performance standards for resource areas do not apply to work in buffer zone, unless there is a specific regulation that requires this.³ An Applicant is not required to file a Notice of Intent for work in buffer zone unless, in the judgment of the issuing authority or the Department, the work proposed would "alter an Area Subject to Protection Under [the Act]." See, 310 CMR 10.02(2)(b).

Although I accept the finding by the Magistrate that BVW alteration would occur, this only means that the Department had jurisdiction to review the proposed Burley Street access road and to require mitigation for this proposed work in the buffer zone. The standard in the regulations is not one-to-one replication for impacts. The standard for buffer zone work is whether the project, as conditioned, that would "contribute to the interests of the Act." 310 CMR 10.03(1)(a)(3). In review of an appeal challenging the Department's SOC, one can also frame the question as follows: Did the Department craft reasonable conditions that were consistent with its authority under the Act and the Wetlands Regulations in its SOC for the work in buffer zone to "contribute to the interests of the Act" for the adjacent resource area of BVW.

³ For example, riverfront performance standards can apply when work in buffer zone is adjacent to riverfront area and work extends into riverfront area per the terms of 310 CMR 10.03(1)(a)(3).

Rather than rely on the findings from the hearing, which was conducted under an improper legal standard, I examine the project, as conditioned by the SOC, to determine whether the project was structured to contribute the interests of the Act. The Department found that the 20 to 24-foot wide access road would be constructed on top of an existing cart path, the filled area of which was also 24 feet wide. There is no dispute about these dimensions in the record. No filling of the BVW would occur as a result of the project in Area 2. Impacts would instead consist of erosion, excavation, vegetation clearing, including removal of tree canopy in buffer zone, and other alteration during construction and ongoing impacts from roadway runoff and periodic road maintenance into the future. *See*, Department's SOC and Prefiled Direct and Cross-Examination Testimony of Jill Provencal.⁴

The nature of the impacts from the Burley Street access road activities was undisputed at the hearing. Since these impacts were unavoidable because no other location was possible for the access road, the Department chose to fashion conditions that would minimize impacts during construction such as the erosion control measures. The Department also accepted the Applicant's offer to provide extensive replication of BVW, totaling 2,850 square feet for Area 2. This replication was found by the Department to compensate for all of the "adverse impacts" from work in the buffer zone that would be caused by the initial construction of the road as well as for the long-term maintenance of the portion of the access road in Area 2 near Burley Street.⁵ *See*, Department's SOC.

⁴ The Magistrate found that the Department did not take the impacts of tree canopy removal into account on a one-to-one basis. In fact, the Department's representative testified that she did take tree canopy removal into account, but she determined that the proposed replication would mitigate for these impacts.

⁵ Note that the "adverse impacts" standard is also now codified in 310 CMR 10.53(1). Although there was a dispute amongst the expert witnesses as to the extent of adverse impacts, a one-to-one accounting for this extent is not required by the Wetlands Regulations applicable to buffer zone work at 310 CMR 10.02 and 10.03, nor is it required by the amended 310 CMR 10.53.

Since none of the adverse impacts could be avoided, I find that the Department's acceptance of the Applicant's mitigation plan, including the 2,850 square feet of BVW replication in Area 2, contributed to the interests of the Act to ensure continuance of the BVW interests provided by the nearby resource area. In reaching this result, the record of the SOC and the testimony of the wetlands staff show that the Department explicitly considered the extent of the work and its close proximity to the BVW. The Department also considered the characteristics of the buffer zone at this site, which buffer zone was extremely narrow and did not allow for construction of the access road in any other location.⁶ See, SOC, and Prefiled Direct and Cross-Examination Testimony of Jill Provencal. Creating a very large new resource area of the same type and in accordance with the technical standards of the Department's Replication Guidance furthered the interests of the Act for adverse impacts to the BVW resource area adjacent to the buffer zone project.

The Magistrate in this matter imposed a different standard upon the Department. She held that the Department had to determine whether the buffer zone work would "destroy or otherwise impair" the BVW and required the Department to calculate precisely the specific area of BVW that would be impaired by the proposed work. She also required a one-to-one replication for this precise area of BVW. As noted above, BVW standards cannot be applied to work in buffer zone. Therefore, I reject the finding of the Magistrate that a precise calculation of

⁶ All of these factors are specifically codified as legitimate considerations in 310 CMR 10.53(1) for conditioning work in buffer zone. Note that the Applicant would have been allowed to fill BVW for a project of this type, given the fact that the only reasonably available access was from Burley Street. The Applicant made every effort here to avoid filling BVW by locating the access road on the footprint of an existing cart path and also offered substantial replication of BVW to mitigate against adverse impacts from the road construction and maintenance. Since the Magistrate found that a one-to-one calculation of impacts would be only 25 square feet greater (i.e., less than 1% greater) than the total replication offered by the Applicant, the extent of replication was more than adequate to meet buffer zone standards, even if the Magistrate's calculation of one-to-one impact are accepted as valid.

BVW damage is legally necessary for the Department to craft conditions in a Superseding Order of Conditions for a project in buffer zone to mitigate against future adverse impacts.

To summarize, the Department accepted the Applicant's proposed 2,850 square feet of replication as well as erosion controls and other measures to mitigate for potential impacts to nearby BVW for the proposed work in the buffer zone to construct and maintain an access road through the only possible route to the property from Burley Street. This was more than sufficient to meet the standard in the Wetlands Regulations to ensure that the project would contribute to the interests of the Act.

For all these reasons, I do not accept the Recommended Final Decision of the Magistrate. Instead, I affirm all of the terms and conditions of the SOC, and I direct the Department staff to prepare a Final Order of Conditions, consistent with this decision, for my signature within five business days of the date of issuance of this Final Decision.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Laurie Burt
Commissioner

NOTICE

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01(14)(e). The motion must be filed with the Case Administrator for the Office of Appeals and Dispute Resolution and served upon all parties within seven business days of the postmark date of this Final Decision. A person who has the right to seek judicial review may appeal this Final Decision to the Superior Court

pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed with the Court within thirty days of receipt of this Decision.